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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Frank Dale McCray,  
10                                      Petitioner,  
11 v.  
12 Charles L. Ryan, et al.,  
13                                      Respondents.  
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No. CV-17-01658-PHX-DJH  
DEATH-PENALTY CASE  
**ORDER**

15            Petitioner Frank Dale McCray has filed a motion for recusal. (Doc. 33.)  
16 Respondents take no position on the motion, noting only that the Court denied a similar  
17 motion under similar circumstances in *Morris v. Ryan*, No. CV-17-00926-PHX-DGC.  
18 (Doc. 34.) For the reasons set forth below, the Court will deny the motion.

19            I.        Background

20            Petitioner was sentenced to death in Arizona state court and remains in custody. He  
21 filed a petition for habeas corpus on April 26, 2018. (Doc. 14.) The Honorable Douglas L.  
22 Rayes, a United States District Judge in this district, presided over McCray's trial and  
23 postconviction proceedings while serving as a Maricopa County Superior Court Judge.  
24 Petitioner argues that the undersigned judge should recuse from this case because the  
25 habeas petition argues that Petitioner's constitutional rights were violated in state court by  
26 Judge Rayes's rulings, and Judge Rayes is now a colleague on this Court. (Doc. 33.)  
27 Petitioner argues that a reasonable person would conclude that the undersigned will be  
28 unable to impartially decide Petitioner's claims due to her professional relationship with

1 her colleague. (*Id.*) After considering the applicable law and facts of this case, the Court  
2 does not agree.

3 II. Applicable Law

4 Judges are presumed to be honest and to serve with integrity. *See Withrow v. Larkin*,  
5 421 U.S. 35, 47 (1975); *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008). In the  
6 absence of a reasonable factual basis for recusal, a judge should participate in cases  
7 assigned to her. *United States v. Holland*, 519 F.3d 909, 912 (2008). Federal judges are,  
8 however, required by 28 U.S.C. § 455(a) to recuse themselves from any proceeding in  
9 which their impartiality might reasonably be questioned, even where no conflict of interest  
10 exists. *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 714 (9th Cir. 1990).

11 The standard for judging the appearance of partiality is objective: “whether a  
12 reasonable person with knowledge of all the facts would conclude that the judge’s  
13 impartiality might reasonably be questioned.” *United States v. Nelson*, 718 F.2d 315, 321  
14 (9th Cir. 1983). Stated differently, the question is whether a reasonable person would  
15 perceive a significant risk that the judge will resolve the case on a basis other than the  
16 merits. *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990). The reasonable person in this  
17 context means a well-informed, thoughtful observer, not a “hypersensitive or unduly  
18 suspicious person.” *Clemens v. U.S. Dist. Court for Cent. Dist. of California*, 428 F.3d  
19 1175, 1178 (9th Cir. 2005) (citing *Mason*, 916 F.2d at 386). And because there is always  
20 “some risk” of partiality, the risk must be “substantially out of the ordinary.” *Mason*, 916  
21 F.2d at 386 (emphasis in original).<sup>1</sup>

22 Analysis of a recusal motion is “necessarily fact-driven” and “must be guided . . .  
23 by an independent examination of the unique facts and circumstances of the particular  
24 claim at issue.” *Holland*, 519 F.3d at 913. Some matters are not ordinarily sufficient to  
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27 <sup>1</sup> Moreover, only “highly exceptional circumstances” mandate disqualification of an  
28 entire district. *See Clemens*, 428 F.3d at 1180. Though Petitioner moves only for  
disqualification of the undersigned, recusal of the entire bench is the logical consequence  
suggested by the extension of Petitioner’s motion to all judges in the district.

1 require a § 455(a) recusal, including “[r]umor, speculation, beliefs, conclusions, innuendo,  
2 suspicion, opinion, and similar non-factual matters.” *Clemens*, 428 F.3d at 1178 (quoting  
3 *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995)).

4 Finally, a judge has a duty to hear an assigned case when there is no legitimate  
5 reason to recuse. *Holland*, 519 F.3d at 912; *Clemens*, 428 F.3d at 1179. Indeed, “[i]t is vital  
6 to the integrity of the system of justice that a judge not recuse himself on unsupported,  
7 irrational or highly tenuous speculation.” *McCann v. Communication Design Corp.*, 775  
8 F. Supp. 1506, 1523 (D. Conn. 1991) (citing *Hinman v. Rogers*, 831 F.2d 937, 939 (10th  
9 Cir. 1987)). Section 455(a) “must not be so broadly construed that it becomes, in effect,  
10 presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of  
11 personal bias or prejudice.” *Holland*, 519 F.3d at 913 (citing *United States v. Cooley*, 1  
12 F.3d 985, 993 (10th Cir. 1993)).

### 13 III. Analysis

14 The Court begins with the “critically important” identification of the specific factual  
15 circumstances that might “cause an objective observer to question [the Court’s]  
16 impartiality.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). Here,  
17 there is only one: the undersigned serves on the United States District Court for the District  
18 of Arizona as a colleague to Judge Rayes, who, as a state-court judge, presided over  
19 Petitioner’s trial and post-conviction proceedings. No other fact is presented, and the Court  
20 concludes that this fact alone does not warrant disqualification. A reasonable observer with  
21 knowledge of all the facts would not, without more, question the partiality of the Court in  
22 presiding over this federal habeas case.

23 Petitioner argues that disqualification is common when a fellow judge is a party to  
24 a legal proceeding. (Doc. 33 at 5) Judge Rayes, however, is not a party to this habeas  
25 proceeding and the cases cited by Petitioner do not support recusal under the factual  
26 circumstances of this case, as explained below.

27 In *United States v. Singer (Singer II)*, 575 F. Supp. 63, 68 (D. Minn. 1983), the judge  
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1 at issue was the Chief Judge of the District of Minnesota, whose extensive comments and  
2 judicial coaching of the prosecutor in front of the jury throughout a criminal trial resulted  
3 in reversal on appeal and remand for a new trial. *See United States v. Singer*, 710 F.2d 431,  
4 436 (*Singer I*) (8th Cir. 1983). On remand, the Chief Judge recused himself and a district  
5 court judge from the same bench was assigned. *Singer II*, 575 F. Supp. at 68. The newly  
6 assigned judge recused herself because the Chief Judge was the subject of testimony in  
7 motions that had been filed and the Chief Judge might be called as a witness. The court  
8 determined that a reasonable person might question whether judges in the district “might  
9 be affected in ruling, either consciously or subconsciously, by friendship or a spirit of  
10 collegiality or because of the relationship between judges on the same bench,” and recused  
11 the entire district court bench. *Id.*

12 In this case, Judge Rayes is not a party or former counsel to a party, nor is he a  
13 potential witness. The Court will have no occasion to judge his credibility or the propriety  
14 of any public comments he may have made outside the course of his regular judicial duties.  
15 The Court will be required to rule on claims that Judge Rayes committed constitutional  
16 error in state court proceedings, but it is not uncommon for district judges to pass on the  
17 correctness of another judge’s judicial actions. District judges routinely review decisions  
18 by magistrate judges who are colleagues housed in the same courthouse and working on  
19 the same caseload. Parties often cite as authority decisions by a district judge’s colleagues  
20 on the same court, requiring the district judge to state publicly whether he or she agrees  
21 with the colleagues’ decisions. And it is common for district judges to rule on alleged errors  
22 by state court judges who may well be colleagues in various bench and bar activities. Given  
23 these regular occurrences, the Court cannot conclude that review of Judge Rayes’s state  
24 court decisions in this case is “substantially out of the ordinary.” *See Mason*, 916 F.2d at  
25 386. An objective, well-informed observer would not perceive a substantial risk of  
26 impartiality in such a situation.

27 The facts presented in *Elston v. Roberts*, 232 Fed. App. 824, 825 n.2 (10th Cir.  
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1 2007), are also dissimilar to this case. The entire district court bench in *Elston* recused  
2 because the defendant in a criminal trial had married an employee of the court. *Elston v.*  
3 *Roberts*, 2006 WL 3337504, \*1 (D. Kansas Nov. 16, 2006). The outcome of the criminal  
4 proceeding, of course, was likely to have a direct impact on the court employee. No similar  
5 impact is possible for Judge Rayes in this case.

6 The other cases cited by Petitioner are also distinguishable. In *United States v.*  
7 *Brandau*, 578 F.3d 1064, 1070 (9th Cir. 2009), the Court of Appeals assigned a case that  
8 challenged the constitutionality of a rule promulgated by the judges of the Eastern District  
9 of California, as well as their very authority to promulgate the rule, to an out-of-district  
10 judge. There was little discussion about the nature of the conflict, but it is not surprising  
11 that a judge's impartiality would be called into question when the judge is asked to rule on  
12 the propriety of actions he or she has taken with the entire court. Moreover, the appellate  
13 court in *Brandau* granted the recused judges the right to retain counsel and intervene in the  
14 rule challenge, demonstrating their personal interest in the proceeding. *Id.* Judge Rayes has  
15 no similar personal interest in the outcome of this case.

16 Similarly, in *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989), recusal was required  
17 because it was improper for a judge to sit on the appeal of his own case.

18 In *60 Key Ctr. Inc. v. Adm'r of Gen. Servs. Admin. (GSA)*, 47 F.3d 55, 56 n.1 (2d  
19 Cir. 1995), the district judges in the Western District of New York recused themselves  
20 because the case "impacted upon" the United States Courthouse for that district. This case  
21 will not impact the work or interests of Judge Rayes as a United States District Court Judge.  
22 His previous work as a state court judge will be reviewed in this habeas proceeding, but  
23 such review happens on a regular basis. As one court has explained, "the more common a  
24 potentially biasing circumstance and the less easily avoidable it seems, the less that  
25 circumstance will appear to a knowledgeable observer as a sign of partiality." *In re Allied-*  
26 *Signal Inc.*, 891 F.2d 967, 971 (1st Cir. 1989).

27 Next, Petitioner asserts that, in cases similar to this, judges in this district have  
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1 recused themselves when asked to review a colleague's past actions as a judge or a lawyer.  
2 (Doc. 33 at 4) (citing *Michael Poland v. Lewis*, No. CIV 90-1822-EHC; *Patrick Poland v.*  
3 *Lewis*, No. CIV 90-1823-PHX-RCB; *Jones v. Ryan*, No. CV-01-00592-TUC-TMB.) This  
4 argument is unpersuasive for two reasons. First, the recusal of the assigned judges under  
5 the circumstances presented in those cases does not dictate recusal under the circumstances  
6 of this case. *See Holland*, 519 F.3d at 913 ("Disqualification under § 455(a) is necessarily  
7 fact-driven and may turn on subtleties in the particular case."). Rather, this Court "must be  
8 guided, not by comparison to similar situations addressed by prior jurisprudence, but rather  
9 by an independent examination of the unique facts and circumstances of the particular  
10 claim at issue." *Holland*, 519 F.3d at 913 (quoting *United States v. Bremers*, 195 F.3d 221,  
11 226 (5th Cir. 1999)).

12 Second, the circumstances of the cases cited by Petitioner are dissimilar to this case.  
13 In *Jones*, the entire Arizona District Court bench recused itself in a capital habeas petition  
14 when an evidentiary hearing was set at which a magistrate judge, formerly petitioner's  
15 defense counsel, was the subject of an ineffective assistance of counsel claim and was listed  
16 as a witness in an evidentiary hearing on the claim. (Doc. 55, Ex's. D-E) (*see also Jones*  
17 *v. Stewart*, No. CV-01-00592-TUC-FRZ (D. Ariz. Nov. 7, 2016) (Reporter's Transcript  
18 ("RT") 10/30 17 at 44.) As previously noted, Judge Rayes is not a witness in this case.

19 In the *Poland* cases, the Honorable Paul Rosenblatt had become a federal district  
20 court judge and was on the bench when these capital habeas cases were brought in district  
21 court. As a trial court judge presiding over the *Poland* cases in Yavapai County, however,  
22 Judge Rosenblatt had found the aggravating factors proven and had also found that the  
23 mitigating circumstances were not sufficiently substantial to call for leniency and  
24 sentenced the defendants to death. *State v. (Patrick) Poland*, 698 P.2d 183, 201 (Ariz.  
25 1985); *State v. (Michael) Poland*, 698 P.2d 207, 209 (Ariz. 1985). Unlike the *Poland* cases,  
26 the aggravating factors and death sentence were determined by a jury in this case. *State v.*  
27 *McCray*, 218 Ariz. 252, 256 (2008). Furthermore, though Petitioner notes that Patrick  
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1 Poland moved for all district judges in the district to be recused, in part because a judge in  
2 the district had served as the state trial judge in the petitioner's case, (*See* Doc. 33 at 4)  
3 (citing Mot. to Recuse, *Patrick Poland v. Lewis*, No. CIV 90-1823-PHX-RCB (D. Ariz.  
4 Apr. 8, 1992), Doc. 44)), the assigned district court judges in the *Poland* cases ultimately  
5 recused themselves on their own summary motions, without setting forth any specific facts.  
6 (Doc. 33, Exs. A–C.)

7 Finally, Petitioner suggests that the Court would be disinclined to believe Judge  
8 Rayes had made unconstitutional or unreasonable rulings due to “friendship or a spirit of  
9 collegiality or because of the relationship between judges on the same bench.” *Singer II*,  
10 575 F. Supp. at 68. The Court does not agree. In *Clemens*, the Ninth Circuit addressed a  
11 petitioner's assertion that personal relationships among the district's judges mandated  
12 recusal where the petitioner was charged with making threats against three of the judges in  
13 the Central District of California. *Clemens*, 428 F.3d at 1176. The district court judge  
14 presiding over Clemens's criminal trial had not been the subject of any of the threats, and  
15 despite the judge's collegial relationship with the threatened judges, the Ninth Circuit  
16 declined to disqualify all judges in the Central District of California. *Id.* The Ninth Circuit  
17 explained that § 455(a) does not require recusal on the basis of speculation, and that  
18 Clemens had merely “speculate[d]—but [did] not tender any evidence—about personal  
19 relationships among the judges of the Central District that might give rise for a reasonable  
20 observer to question the impartiality of the judges.” *Id.* at 1180. Such speculation runs  
21 counter to the oath of office taken by federal judges, in which the judges solemnly swear  
22 to administer justice “impartially” and “without respect to persons.” 28 U.S.C. § 453. In  
23 the absence of specific supporting evidence, such speculation does not give rise for a  
24 reasonable observer to question the impartiality of this Court.

#### 25 IV. Conclusion

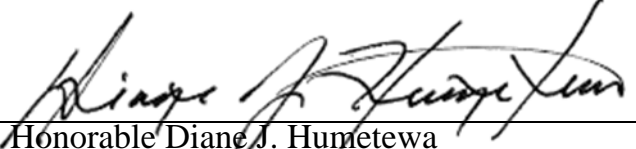
26 In the absence of a reasonable factual basis for recusal, the Court has a duty to hear  
27 all assigned cases, including this one. *Holland*, 519 F.3d at 912. The Court does not find a  
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1 reasonable factual basis for recusal. Although this case challenges rulings Judge Rayes  
2 made as a state court judge several years ago, the task of passing on decisions of other  
3 judges is not “substantially out of the ordinary,” *Mason*, 916 F.2d at 386, nor does it present  
4 the “highly exceptional circumstances” needed to disqualify this entire district, *Clemens*,  
5 428 at 1180.

6 Accordingly,

7 **IT IS ORDERED** that Petitioner’s Motion to Recuse (Doc. 33) is DENIED.

8 Dated this 28th day of May, 2019.

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10   
11 Honorable Diane J. Humetewa  
12 United States District Judge  
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